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IN THE

Supreme Court of the United States

October Term, 1951

No.

RICHMOND, FREDERICKSBURG AND POTOMAC RAILROAD COMPANY, a corporation, *Petitioner*,

v.

THOMAS M. BROOKS, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

The Richmond, Fredericksburg and Potomac Railroad Company, a corporation, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled cause on May 15, 1952.

OPINIONS AND JUDGMENT BELOW.

The majority opinion of the Court of Appeals by Judge Fahy, the concurring opinion of Judge Edgerton and the dissenting opinion of Judge Proctor have not yet been re-

ported, but they appear in the Record filed herewith (R. 241).

The verdict and judgment in the trial court (R. 9), and the order and remittitur following judgment (R. 11) have not yet been reported.

JURISDICTION.

The judgment of the Court of Appeals was entered on May 15, 1952 (R. 248). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED.

The respondent, a flagman employed by the petitioner, while riding in the caboose of a freight train, which was equipped with a power brake system which gave the *engineer* the control of the train required by the Safety Appliance Act, was injured by the sudden stopping of the train when the *conductor* applied the emergency air brake from the caboose when he observed smoke from a "hot box" on one of the cars.

The questions are whether the District Court erred,

(1) In leaving to the jury any issue predicated on a violation of the Safety Appliance Act; and

(2) In instructing the jury, under the above circumstances, that if they found that the brakes failed to function "efficiently" when applied by the conductor from the rear of the train, such failure constituted a violation of the Safety Appliance Act and thereby fastened absolute liability on the defendant railroad company.

STATUTES INVOLVED.

Safety Appliance Act.

§ 1. *Driving-wheel brakes and appliances for operating train-brake system.* It shall be unlawful for any common carrier engaged in interstate commerce by railroad to use

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on its line any locomotive engine in moving interstate traffic not equipped with a power driving wheel brake and appliances for operating the train-brake system, or to run any train in such traffic that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose (Act of March 2, 1893, ch. 196, § 1, 27 Stat. 531; 45 U.S.C. § 1).*

Federal Employers' Liability Act.

§ 51. *Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence, definition of employees.* Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

* * * * * * * * *

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* Section 9 of the Safety Appliance Act and Regulations of the Interstate Commerce Commission define what constitutes a "sufficient number of cars" under above Section 1, about which no question has been raised in this case; and other Sections of the Safety Appliance Act refer to automatic couplers, grab irons, hand brakes and other appliances not involved in this appeal.

(Act of April 22, 1908, ch. 149, § 1, 35 Stat. 65; amended August 11, 1939, ch. 685, § 1, 53 Stat. 1404; 45 U.S.C. § 51.)

§ 53. *Contributory negligence; diminution of damages.* In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided,* That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. (Act of Apr. 22, 1908, c. 149, § 3, 35 Stat. 66; 45 U.S.C. § 53.)

The phrase at the end of Section 53, relating to the defense of contributory negligence, is repeated at the end of Section 54 relating to the defense of assumed risks.

STATEMENT OF THE CASE.

1. The Facts.

This action was instituted in the United States District Court for the District of Columbia by Thomas M. Brooks, respondent, hereinafter called the "plaintiff," against the Richmond, Fredericksburg and Potomac Railroad Company, petitioner, sometimes hereinafter called "defendant" and sometimes called "RF&P", to recover damages on account of personal injuries sustained by plaintiff, a flagman, who was riding in the caboose of a freight train. The majority opinion by the Court of Appeals for the District of Columbia Circuit succinctly states the facts of the case and petitioner takes the liberty of quoting the following factual statement from the opinion below:

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"The train was en route from Richmond to the vicinity of Washington. It was composed of about one hundred and twelve cars. Its locomotion was supplied by four diesel units. When well along the way and traveling about 50 miles an hour smoke and some fire were observed by crewmen coming from beneath a car near the middle of the train. The engineer was signalled that the cause was a hot box. If it was, there was evidence that company rules required the train to be brought to an immediate stop to avoid the wringing off of an anxle with possible derailment or other serious consequences. The engineer, however, due in part to the color of the smoke, thought the trouble was a sticking brake. He accordingly applied and then released the air brakes, which was a method of remedying a sticking brake. This first slowed down the train to a speed of approximately 20 to 25 miles per hour, but after the brakes were released the speed gradually increased. The pressure in the air brake system was reduced by this operation.

"Meanwhile the conductor in charge of the train, who was in the caboose with plaintiff, had also noticed the smoke and correctly concluded it was due to a hot box. The train-brake system, as well as being subject to control by the engineer was equipped with a valve in the caboose for use by the conductor in an emergency. He decided to apply the brakes by this means but when preparing to do so the train began to slow down because of the action of the engineer already described, which led the conductor to believe the engineer was stopping the train. When the train then began to gather speed, however, the conductor concluded the engineer had in fact not observed the smoke. He thereupon applied the brake system by opening a valve attached to the rear of the caboose. The result was the rough stop which threw plaintiff, an employee of defendant, to the floor." (R. 242.)

The District Court found (R. 237) and the Court of Appeals agreed (R. 245) that there was no dispute that the locomotive was *equipped* with power or train brakes as required by Section 1 of the Safety Appliances Act. A car with a defective brake was removed from the train before

it left Richmond, but otherwise, during inspections made before and after the accident, *no defects* were discovered in any of the braking equipment of the train (R. 200-205, 222-223).

Furthermore, the engineer made three or four brake applications on the train prior to the accident (R. 99) and various applications after the accident on the way to Washington (R. 104). Although there was some conflict between the testimony of the engineer and of the front brakeman as to the air pressure on the air brake line at the time the train left Richmond, and also immediately before the stop in question (R. 74, 90, 100, 109), there was no controversy whatever as to the fact that the brakes, when operated by the *engineer* on the locomotive, *functioned in the normal and customary manner at all times* during the course of the trip from Richmond to Washington, and no rough stops occurred, other than the emergency one in question, which occurred when the conductor applied the brakes by opening the emergency valve in the caboose.

2. Proceedings Below.

At the close of all the evidence, the trial court overruled the defendant's motion for a directed verdict and submitted the case to the jury on the following two of the four grounds which the plaintiff had alleged in his complaint: (1) whether the engineer was negligent in failing to stop the train when he saw smoke and, if so, whether his negligence was the proximate cause of the accident, and (2) whether the defendant had violated the Safety Appliance Act (R. 238).

On the latter issue, the District Court instructed the jury that there was no dispute that defendant's locomotive and a sufficient number of its cars were equipped as required by the Act (R. 237). However, the District Court further instructed the jury that the law also required that "the train brakes must operate efficiently" (R. 237), and that if they found that the air brakes failed to function

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"efficiently at the time of the accident *although applied in a normal, usual and customary manner by the conductor from the caboose by the control of the conductor's valve,* then said failure fastens liability on the defendant, irrespective of whether the defendant was negligent or not" (R. 238, 7). (Emphasis supplied)

The jury returned a general verdict for the plaintiff in the amount of $75,000 without specifying on which of the two issues they had based their verdict (R. 9). On the defendant's motion for a new trial the District Court ruled that the motion would be granted unless the plaintiff filed a remittitur of $25,000, and the remittitur was filed by the plaintiff (R. 11).

The defendant appealed to the United States Court of Appeals for the District of Columbia Circuit and on May 15, 1952, that Court affirmed the judgment of the District Court (R. 247).

One of the judges of the Court of Appeals (Judge Edgerton) was of the opinion that it was unnecessary to review the question of the applicability of the Safety Appliance Act when the brakes are applied by the conductor from the rear and he concurred in affirmance, but did not concur in the part of the opinion which reviewed the applicability of the Safety Appliance Act. The other two judges agreed that that question should be reviewed, but were divided in their decision. Therefore, there was no majority holding of the Court of Appeals on the precise question here presented with respect to the application of the brakes from the rear. The author of the majority opinion admitted that the "precise question presented is one of first impression" (R. 246), and concluded that "A fair reading of the statute in the light of its purpose, and as it has been construed in *Myers* v. *Reading Co.*, [331 U.S. 477 (1947)], *supra*, required that the train-brake system function efficiently not merely in or from the engine . . ." (R. 245). The dissenting judge wrote no opinion. With respect to petitioner's contention that the Act does not require the "efficiency" test under the circumstances here presented,

two of the three judges below combined to reject that contention.*

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals erred in affirming the District Court's erroneous action:

1. In submitting to the jury any issue predicated on a violation of the Safety Appliance Act (R. 238); and

2. In granting plaintiff's prayer No. 1 (R. 7) and in instructing the jury orally that, even though the train was equipped with air brakes which gave the *engineer* the control of the train required by the Safety Appliance Act, if the jury found that the brakes failed to function "efficiently" when applied by the *conductor* from the rear of the train, such failure constituted a violation of the Safety Appliance Act, thereby fastening liability on the Railroad Company, irrespective of whether the Company was negligent (R. 238).

REASONS FOR GRANTING THE WRIT.

1. The Precise Question Presented is One of the First Impression and was not Authoritatively Decided by the Court of Appeals Below.

Neither party to this action has found any reported cases in which the issue, with respect to operation of the brakes from the rear of the train, presented by this petition has been raised. The author of the majority opinion below stated that "the precise question presented is one of first impression" (R. 246). It would seem obvious that the is-

* The majority of the court below overruled defendant's contention that the District Court erred in refusing to rule as a matter of law that the plaintiff failed to prove that the alleged negligence of the engineer was the proximate cause of the accident. For the purpose of emphasizing the questions above, with their more far-reaching impact on the operations of railroads under the provisions of the Safety Appliance Act, defendant does not argue here the holding of the court below on proximate cause.

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sue now raised on the proper interpretation of the Safety Appliance Act is one of great importance measured simply by the number of railroads and the number of trains daily operating in interstate commerce with similar braking systems and mechanisms.

Certainly, both the District Court and the author of the majority opinion in the Court of Appeals have recognized that their interpretation of the Safety Appliance Act extends the coverage of the Act beyond the plain, specific words employed by Congress. Liability without regard to proof of negligence has been imposed by Congress on railroads only in the few sections of the Safety Appliance Act. Beyond those specific requirements the railroads, like all others, are liable only for negligence. The significance of the specificity of the requirements of the Safety Appliance Act is obvious. The author of the majority opinion in the Court of Appeals favored extension of the coverage of the Act based on his ideas of "the policy and spirit of the law" (R. 245), and stated that such extension gave effect to the "Congressional purpose" (R. 246).

Petitioner denies that the words here used by Congress are susceptible of construction beyond their plain meaning. Certainly, since the long-standing language has been weighed and considered by the Court below against a policy or spirit claimed to be contrary to the plain meaning of the words, such a decision should be reviewed by this Court. The fact that the question has never before been presented and the fact that the Court of Appeals by virtue of a three-fold split has left the question discussed but not decided, climaxes the need for decision by this Court.

The limits of the language of other sections of the Safety Appliance Act have, in recent years, warranted scrutiny by this Court. See *Myers* v. *Reading Co.*, 331 U.S. 477 (1947). In *O'Donnell* v. *Elgin, J. & E. R. Co.*, 338 U.S. 384 (1949), this Court was confronted with alternative contentions as to the proper interpretation of Section 2 of the Safety Appliance Act (27 Stat. 531, 45 U.S.C. § 2), the section which

requires that cars be equipped "with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars." In that case a majority of this Court rejected the particular literal reading of Section 2 there contended for but not until the entire question was carefully reviewed and the dissenting views expressed. See also *Affolder* v. *N. Y. C. & St. L. R. Co.*, 339 U.S. 96 (1950).

On the basis of the above decisions it is submitted that the instant case, admittedly involving a novel question and now admittedly resting on an interpretation of an important Federal statute which frankly rejects the actual wording of the statute in favor of an alleged contrary policy, most surely calls for clarification by this Court.

2. Coray v. Southern Pacific Co. is not Controlling.

The author of the majority opinion in the Court of Appeals said that his interpretation of the Act

> "seems to conform with the approach of the Supreme Court as evidenced, for example, by *Coray* v. *Southern Pacific Co.*, 335 U.S. 520 (1949), where a narrow construction of the Act was avoided." (R. 246-7.)

The petitioner can not agree with this statement. To be sure, *Coray* held that

> "* * * This Act, fairly interpreted, must be held to protect all who need protection from dangerous results due to maintenance or operation of *congressionally prohibited defective appliances* . . ." (335 U.S. at pp. 522-23) (Emphasis supplied)

However, the precise point of petitioner is that the instant case, as distinguished from the *Coray* case, involves no situation legislated on by Congress. The *Coray* case involved *admittedly defective equipment* which deprived the *engineer on the locomotive* of his ability to control the train. The accident in the instant case grew out of no defect which affected the control by the engineer; it resulted

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from the use of an emergency device supplied by the railroad for the safety of its employees *over and above the requirements of the Safety Appliance Act.* It is most earnestly submitted that no policy nor spirit of the law imposes absolute liability without regard for negligence under such conditions.

3. The Trial Court's Submission to the Jury of Any Issue Under the Safety Appliance Act was Erroneous.

The sole requirement of Section 1 of the Safety Appliance Act is that the locomotive engine shall be equipped with a power driving-wheel brake and appliances for operating the train-brake system, and that each train shall have a sufficient number of cars in it so equipped with power or train brakes that the *engineer on the locomotive* can control its speed, without requiring brakeman to use the common hand brake for that purpose.

While the decisions have made it clear that "equipped" within the meaning of the statute requires that such equipment be not defective, there is no requirement in the Act that trains should be equipped with a braking mechanism which would give the *conductor* control of the train *from the rear thereof.* Congress might have so legislated, but it did not do so.

The only evidence in the record is that the train in question was equipped in accordance with the statute and that both immediately before and after the accident in question the engineer was able to control and did control perfectly the speed of the train. There is absolutely no evidence from which either a court or a jury could infer that the train was not equipped with power brakes which enabled the *engineer on the locomotive* to control the train at all times. (R. 99, 104, 236, 237.)

4. The Trial Court's Instruction to the Jury on the Question of the Efficiency of the Air Brakes was Erroneous.

Plaintiff's Prayer No. 1 was erroneously granted and read to the jury as an instruction from the Court in the following words:

> "The Court instructs the Jury that if they find from the evidence that the accident was proximately caused, in whole or in part, by the failure of the air brakes to function efficiently at the time of the accident, although applied in a normal, usual and customary manner by the conductor from the caboose, by use of the conductor's valve, that if they so find, then said failure fastens liability on the Defendant, irrespective of whether the Defendant was negligent or not" (R. 7).

The theory of such an instruction is doubly erroneous.

In the first place, as pointed out above, no section of the Safety Appliance Act requires any mechanism for braking the train from the rear.

In the second place, while the decisions construing the Safety Appliance Act leave no doubt that the word "equipped" must be construed to mean that the specified equipment be not defective, the Safety Appliance Act requires only one specific appliance to be "efficient". Section 11 of the Act (36 Stat. 298, 45 U.S.C. § 11), dealing with various safety appliances, specifically provides that "All cars must be equipped with . . . *efficient hand brakes.*" (Italics added.) Such wording is significantly lacking from the *air brake* section of the statute. In like manner, Section 2 of the Act (27 Stat. 531, 45 U.S.C. § 2), dealing with automatic couplers, specifically requires that the couplings couple automatically by impact. Ladders handholds and grab irons are required to be *secure* (Sec. 11, *supra*). Again no such particularization appears in Section 1, the air brake section.

Accordingly, it is the earnest contention of the defendant that, under no circumstances, can the duty of the railroad to provide air brake equipment require more than that such

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brakes be not defective. Obviously, the word of art, "efficient," carefully selected for use in Section 11, carries on its face, and particularly to a jury, an implication of a much higher duty than was actually imposed by Section 1 of the Act.

The decisions of this Court have never been concerned with this precise point. The author of the majority opinion in the Court of Appeals referred to the case of *Myers* v. *Reading Co.*, 331 U.S. 477 (1947), as support for his rejection of the railroad's objection to the use of the word "efficient." However, that case was concerned only with Section 11 of the Safety Appliance Act which, of course requires cars to be equipped with "*efficient* hand brakes; . . ." In the case of *Affolder* v. *N. Y. C. & St. L. R. Co., supra,* relied on by the author of the majority opinion in the Court of Appeals, the *railroad* contended that the test under Section 2, the automatic coupler section of the Safety Appliance Act, was whether the cars were equipped with "efficient couplers" instead of couplers which "in fact failed to couple." The rejection by this Court of the contention of the railroad is obviously not dispositive of the question here presented.

On the other hand, the distinction between "efficient" and "non defective" is clearly brought out in the case of *Thayer* v. *Denver & R. G. R. Co.*, 25 N. M. 559, 185 Pac. 542 (1919), *subsequent appeal on different ground*, 28 N. M. 5, 205 Pac. 733 (1922), where it was held that even a finding by a jury, in answer to a special interrogatory, that the hand brake rigging on the car in question was not in any manner defective would not be equivalent to a finding that the car was equipped with an "efficient" hand brake. While the absence of the defects is the test imposed by other sections of the Safety Appliance Act, the court held in accordance with what is obvious on the face of Section 11, that that section imposed a requirement over and above a mere absence of defects. The court pointed out (185 Pacific 545):

> "It will be noted that 'defective' is not used [in the interrogatory] as the antonym of 'efficient', *and no lexicographers, so far as we know, so use it.* It is true, there are cases which imply that 'defective' is synonymous with 'inefficient' (*Geloneck* v. *Dean Steam Pump Co.*, 165 Mass. 202, 43 N. E. 85; *Kansas City, M. & B. R. R. Co.* v. *Burton*, 97 Ala. 240, 12 South. 88. And the Supreme Court of the United States has used the word 'defective' in speaking of a coupler which failed to work (*San Antonio, etc. R. R. Co.* v. *Wagner*, 241 U. S. 476, 36 Sup. Ct. 626, 60 L. Ed. 1110), *and of air brakes which failed to function* (*Spokane, etc. R. R. Co.* v. *Campbell* 241 U. S. 503, 36 Sup. Ct. 683, 60 L. Ed. 1125), and of ladders which were insecure (*Texas & Pacific Ry. Co.* v. *Rigsby*, 241 U. S. 33, 36 Sup. Ct. 482, 60 L. Ed. 874); *but in each case the language of the Safety Appliance Act was different, and there was no point made, as here, that a hand brake might be inefficient, and not necessarily defective.*" (Italics added)

See also *Spokane & Inland R. R. Co.* v. *Campbell*, 241 U. S. 497 (1916).

We find no close support in any decisions for the extension of the specifically chosen wording of Section 11 to the long-established wording of Section 1.

Accordingly, it is submitted that the District Court erred in submitting to the jury the question of the "*efficiency*" of the mechanism for braking the train *from the rear* and by not ruling as matter of law that there was no violation of the Safety Appliance Act.

Clearly, an improper issue was presented to the jury, and if either of the two issues submitted to the jury was incorrect, the defendant is entitled to a new trial. *Tiller* v. *Atlantic Coast Line R. Co.*, 323 U. S. 574 (1945); *Christian* v. *Boston & M. R. R. Co.*, 109 Fed. 2d 103 (CCA 2 1940); *Baltimore & O. R. Co.* v. *Reeves*, 10 Fed. 2d 329 (CCA 6 1926).

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CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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